Office - Supreme Court, U.S.
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JUN 25 1957
JOHN T. FEY, Clerk

No. [redacted]223

United States Court of Appeals

FOR THE SECOND CIRCUIT.

No. 24,278.

EVELYN McAFOOS and WILLIAM NEFF,

Plaintiffs-Appellants,

against

THE CANADIAN PACIFIC STEAMSHIPS, LTD., and THE CANADIAN PACIFIC RAILWAY CO.,

Defendants-Appellees.

~~BRIEF AND~~ APPENDIX ~~FOR DEFENDANTS-APPELLEES.~~

~~BLEAKLEY, PLATT, GILCHRIST & WALKER,~~
~~*Attorneys for Defendants-Appellees,*~~
~~120 Broadway,~~
~~New York 5, N. Y.~~

~~DENNIS P. DONOVAN,~~
~~ERNEST S. BALLARD, JR.,~~
~~*Of Counsel.*~~

APPENDIX.

Statement Under Rule 15(b).

This civil action was filed October 25, 1955 and service was promptly effected on both defendants. (An admiralty libel had been previously commenced September 21, 1955, Ad. 186-206.) Thereafter several extensions of time were granted to answer, etc., running to June 1, 1956.

On May 2, 1956 a notice of deposition was made and served thereafter. (At the same time a notice of deposition was served in the admiralty matter.) Plaintiffs' deposition was taken in mid-May. None of the papers relating to the depositions are on file.

On June 2, 1956 the notice of motion to dismiss, which now is the subject of this appeal, was served. Argument was had before the Honorable Richard H. Levet on June 19th, following which an opinion was rendered, July 5th.

An order to show cause to stay signature and entry of judgment was signed by Judge Levet July 12, 1956. A notice to re-argue the motion for dismissal and a notice of amendment of the complaint was served by Plaintiffs July 18, 1956. On July 23rd the stay on judgment was denied. On August 2, 1956 the judgment of dismissal of the complaint and the order denying reargument were signed.

The notice of appeal was filed August 17, 1956.

Judgment of Dismissal.

Defendants, having moved for an order dismissing the complaint herein and the motion having duly come on before me on the 19th day of June, 1956, to be heard,

Now, upon reading and filing the notice of motion dated May 31, 1956, and the annexed affidavit of Dennis P. Donovan, verified June 1, 1956, together with the exhibits annexed thereto, and Bleakley, Platt, Gilchrist & Walker, by Ernest S. Ballard, Jr., having appeared in support of said

motion, and Cooper, Ostrin & De Varco, by Richard Gyory, having appeared in opposition to said motion, and due deliberation having been had thereon, and the opinion of this Court having been filed, it is, on motion of Bleakley, Platt, Gilchrist & Walker,

ORDERED, that defendants' motion to dismiss the complaint be and the same hereby is granted; and is is further

ORDERED, and adjudged that the complaint be and the same hereby is dismissed, and that judgment be entered herein in favor of the defendants and against the plaintiffs, together with the costs and disbursements of this action, to be taxed.

Dated, New York, August 2, 1956.

RICHARD H. LEVET,
U. S. D. J.

Judgment entered: 8/2/56.

HERBERT A. CHARLSON,
Clerk.

Order Denying Reargument.

August 2, 1956.

Plaintiff's Motion for Reargument is denied.

So Ordered.

RICHARD H. LEVET.

August 2, 1956.

Opinion of Levet, D. J.

This is an action under the Jones Act, 46 USCA 688, to recover for personal injuries claimed to have been sustained by plaintiff, Evelyn McAfoos, as a result of the aforesaid negligence of the defendants and the unseaworthiness of the vessel, the *S.S. Empress of Scotland*. The complaint also includes a claim for maintenance and cure. Plaintiff McAfoos is a magician's assistant, and plaintiff, William Neff, is a magician. They alleged that while they were employed by the defendants as members of the entertainment crew and staff of the *S.S. Empress of Scotland*, plaintiff McAfoos fell through an open hatch on said vessel. Plaintiff Neff seeks to recover for the curtailment of his business relationship with Evelyn McAfoos, alleged to have been caused by defendants' negligence and the unseaworthiness of the aforesaid vessel.

Defendants have moved to dismiss the complaint on the ground that prior to the institution of this action, the plaintiffs had commenced an admiralty action (No. 186-206) against the same defendants for the identical causes of action as alleged herein and that said action is presently pending in this Court. Defendants' motion to dismiss the complaint is predicated on the theory that the commencement of the suit in admiralty by plaintiffs constituted an election of remedies under the Jones Act, and on the further ground that there is another action pending in this Court for the same relief as is sought herein. Plaintiffs argue that no election had been made by them because they did not incorporate the Jones Act in their admiralty suit and that they did not allege in said suit that they were employed by the defendants.

Although plaintiffs contend that in their admiralty suit they have not alleged facts relating to employment, it is clear that they are relying upon an employer-employee relationship in said suit. Plaintiff McAfoos alleges in the admiralty suit that she was a member of the entertainment crew and staff of the *S.S. Empress of Scotland*, and,

in addition to her other claims, she seeks to recover in said suit for maintenance and cure. The right to maintenance and cure is conferred by general maritime law and is contractual in the sense that it has its origin in, and is an incident to, the contract of employment. Cortes *v.* Baltimore Insular Line, 287 U. S. 367. It is a right given by general maritime law in consequence of the seaman's status under his contract of employment between the seaman and the shipowner. The term "seaman" is not limited to those who can "hand, reef, and steer" and has been extended to include a person employed as an entertainer on board a vessel. *The Sea Lark*, D. C. Wash. 1926, 14 F. 2d 201.

Plaintiffs have also alleged in their admiralty suit a cause of action for negligence on the part of the defendants, their agents and employees. Plaintiffs now claim that they do not rely upon the Jones Act in said suit. It should be observed that, absent the relief provided by the Jones Act, a seaman cannot sue a shipowner in admiralty for negligence. *The Osceola*, 189 U. S. 158.

Manifestly, if plaintiffs are permitted to proceed in both actions, a judgment in one is *res adjudicata* with respect to the other. Baltimore S.S. Co. *v.* Phillips, 274 U. S. 316. Plaintiffs cannot expect to obtain a double indemnity by fostering twin actions. The issue presented here, however, is whether plaintiffs are deemed to have elected to pursue their rights in admiralty rather than at law.

The Jones Act, 46 USCA 688, provides that "Any seaman who shall suffer personal injury in the course of his employment may, *at his election*, maintain an action for damages at law, with the right of trial by jury. . . ." [emphasis added] Prior to the enactment of the Jones Act in 1920, a vessel and its owners were liable in admiralty to seamen who were injured in the service of the ship for their wages, maintenance and cure, and compensation for injuries received as a result of the unseaworthiness of the ship or its equipment. *The Osceola*, 189 U. S. 158. The

seamen could not recover an indemnity for the negligence of the master, or any member of the crew, beyond maintenance and cure. *The Osceola, supra.* In any personal injury action for damages brought by seamen prior to the Jones Act, the affirmative defenses of assumption of risk, the fellow-servant rule, or contributory negligence, could be availed of by the employer. The Jones Act permits injured seamen, at their election, to maintain an action at law for damages for personal injury caused by the negligence of the employer and the aforementioned affirmative defenses were abolished. A seaman's right to elect to sue under the Jones Act also extends to suits in admiralty. See Panama R. R. Co. *v.* Johnson, 264 U. S. 375.

It is now also well established that a plaintiff may claim damages under the Jones Act for negligence, or under the maritime law for unseaworthiness and that he may join both causes of action in a single suit without being deemed to have made an election between them. McCarthy *v.* American Eastern Corporation, 2 Cir. 1949, 175 F. 2d 717; Baldo *v.* Lykes Bros. S. S. Co., 2 Cir. 1950, 179 F. 2d 943; Yates *v.* Dann, 3 Cir. 1955, 223 F. 2d 64; Williams *v.* Tide Water Associated Oil Company, 9 Cir. 1955, 227 F. 2d 791. The election contemplated by the Jones Act is "between a trial by jury and a suit in admiralty." Baldo *v.* Lykes Bros. S. S. Co., *supra*, at p. 945. Thus, it is said that an injured seaman has three remedies: (1) In admiralty against the ship, without benefit of the Jones Act; (2) At law against the shipowners and under the Jones Act or any other branch of the maritime law; (3) In admiralty against the shipowners and under the Jones Act or any other branch of the maritime law." Platt *v.* Chesapeake & O. Ry. Co., D. C. Ohio 1948, 82 F. Supp. 968, 974.

In the case at bar the plaintiffs clearly indicated by commencing their admiralty suit that they elected to sue in admiralty against the shipowners rather than at law. Their position is not unlike that of the plaintiff in Murphy *v.* American Barge Line Co., D. C. W. D. Penn. 1950, 93 F.

Supp. 653, where an injured seaman instituted a civil action against the owner of a vessel, alleging negligence and unseaworthiness. He thereafter filed a libel against the same owner for the same cause of action as asserted in the civil action. The Court held that the seaman made an election when he commenced his civil action and, therefore, dismissed the admiralty suit. Since the recovery which the plaintiffs seek in this action is identical to that which is sought in their admiralty action, they are deemed to have made their election when they filed their suit in admiralty. See Jonassen *v.* Norwegian American Line, Inc., D. C. S. D. N. Y. 1952, 105 F. Supp. 510. To require the defendants to plead to and defend two separate suits commenced by the same plaintiffs against the same defendants predicated on identical causes of action would be unduly vexatious. See Paluchowska *v.* United States Lines, Inc., D. C. S. D. N. Y. 1950, 93 F. Supp. 751.

Defendants' motion to dismiss the complaint is, therefore, granted.

Settle order on notice.

Dated: New York, N. Y.
July 5, 1956.

RICHARD H. LEVET,
United States District Judge.

APPENDIX.

Notice of Motion.

(12) UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EVELYN MC AFOOS and WILLIAM NEFF, Plaintiffs, *against* THE CANADIAN PACIFIC STEAMSHIPS, LTD., and the CANADIAN PACIFIC RAILWAY CO., Defendants.	Civil Action. No. 104-218.

The defendants move the Court as follows:

1. To dismiss the complaint herein on the grounds that plaintiffs have heretofore elected to proceed in Admiralty pursuant to 46 U. S. C. A., 688, by filing Admiralty Libel No. 186-206 in this Court prior to the commencement of this action, or, in the alternative, to dismiss the complaint herein on the grounds that plaintiffs have failed to elect between a claim founded on negligence and a claim founded on unseaworthiness.

2. To dismiss the complaint herein on the ground that there is another action pending in this Court for the same relief sought herein between the same parties, and more particularly Admiralty Libel No. 186-206, commenced prior to this action, or, in the alternative, for an order staying further proceedings in this case on the grounds that

8a

Notice of Motion.

Admiralty Libel No. 186-206 commenced prior to this action seeks the same relief as is sought herein.

Dated, New York, May 31, 1956.

BLEAKLEY, PLATT, GILCHRIST & WALKER

By DENNIS P. DONOVAN
A Member of said Firm.
Attorneys for Defendants herein,
Office and Post Office Address:
120 Broadway, Borough of Manhattan,
New York 5, N. Y.

(13) To:

SIDNEY ROFFMAN, Esq.,
Attorney for Plaintiffs,
225 Broadway,
New York 7, New York

COOPER, OSTRIN & DE VARCO, Esqs.,
Of Counsel,
655 Madison Avenue,
New York, New York

PLEASE TAKE NOTICE that the undersigned will bring the above motion on for hearing before this Court, at Room 506, United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 19th day of June, 1956, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.
Dated, New York, May 31, 1956.

BLEAKLEY, PLATT, GILCHRIST & WALKER

By DENNIS P. DONOVAN
A Member of said Firm.
Attorneys for Defendants herein,
Office and Post Office Address:
120 Broadway, Borough of Manhattan,
New York 5, N. Y.

Affidavit of Dennis P. Donovan, Read in Support of Motion.

[Same Title.]

(14) State of New York }
County of New York } ss.:

Dennis P. Donovan, being duly sworn, deposes and says that:

1. He is an attorney at law and a member of the firm of Bleakley, Platt, Gilchrist & Walker, attorneys for the defendants herein, and is fully familiar with the facts and prior proceedings heretofore had herein. This affidavit is made by deponent rather than defendants due to the fact that both defendants are foreign corporations.

2. This affidavit is made in support of defendants' motions to dismiss the complaint herein on the grounds that plaintiffs have heretofore elected to proceed in Admiralty, and on the further grounds that there is another prior action pending for the relief sought herein.

3. On September 21, 1955, there was filed a libel action in this Court involving the same parties and setting forth the same alleged causes of action as are set forth in the complaint herein. The libel was served on September 22, 1955, as is indicated by the Marshal's return filed on September 29, 1955. The libel is numbered Admiralty No. 186-206. A copy of the libel and citation are annexed hereto (15) and made a part hereof and marked Exhibit A.

4. On October 25, 1955, the complaint herein was filed and the summons issued. The Marshal's return indicates that the summons was served on October 26, 1955. A copy of the summons and complaint in this action are annexed hereto and made a part hereof, and marked Exhibit B.

Affidavit of Dennis P. Donovan, Read in Support of Motion.

5. The prosecution of this second action will cause inconvenience to the defendants and is unduly harassing.

WHEREFORE, your deponent respectfully prays that defendants' motion to dismiss the complaint herein be granted.

DENNIS P. DONOVAN

Sworn to before me this
1st day of June, 1956.

LEE H. TURNER
Notary Public

LEE H. TURNER
Notary Public, State of New York
No. 24-9399350
Qualified in Kings County
Commission Expires March 30, 1958

Exhibit A, Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

Citation AD-186-206.

(16) THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE MARSHAL OF THE SOUTHERN DISTRICT OF NEW YORK—GREETING:

WHEREAS a libel was filed in the United States District Court for the Southern District of New York, on September 21st, 1955 by

EVELYN MC AFOOS and WILLIAM NEFF,
Libellant,

against

THE CANADIAN PACIFIC STEAMSHIPS, LTD., and
THE CANADIAN PACIFIC RAILWAY CO.,
Respondents:

in a certain cause civil and maritime for damages for Personal Injuries, etc. therein alleged to be due and owing to the said Libellant, amounting to $175,000. and praying that a citation may issue against the said Respondents pursuant to the rules and practice of this Court.

NOW THEREFORE WE DO HEREBY COMMAND YOU, the said Marshal, to cite and admonish the said Respondents, if found in your District, to be and appear before the said District Court, on the 4th day of October, 1955, at 10:00 A. M. at the office of the Clerk thereof, in the U. S. Courthouse, in the Borough of Manhattan, City of New York, then and there to file appearance and stipulation for costs, and to answer or except to said Libel within three weeks thereafter, otherwise the Libellant may enter an interlocutory or final decree as may be proper. And have you then and there this writ with your return thereon.

WITNESS, the Honorable WILLIAM BONDY, Chief Judge of said Court, at the Borough of Manhattan, City of New

Exhibit A, Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

York, in said District, this 21st day of September, A. D. 1955.

WILLIAM V. CONNELL,
Clerk

by .....
Deputy Clerk

(SEAL)

COOPER, OSTRIN & DE VARCO,
655 Madison Avenue, New York, N. Y.
Proctor for Libellant

13a

Exhibit A. Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

Libel.

(17) To the Honorable Judges of the United States District Court for the Southern District of New York:

IN ADMIRALTY.

The libel and complaint of

Evelyn Mc A[illegible]os and William Neff in a cause of action maritime and civil for negligence, neglect to treat, unseaworthiness, maintenance and cure, and wages,

Libellants,

against

The Canadian Pacific Steamships, Ltd., and the Canadian Pacific Railway Co.,

and

The Vessel SS "Empress of Scotland," her equipment, etc., *in rem* and *in personam*,

Respondents.

Libellants, by their proctor, Sidney Roffman, allege, upon information and belief as follows:

1. That the steamship, "*Empress of Scotland,*" is a vessel engaged in interstate and foreign commerce and is now or soon will be during the pendency of process herein, within the Southern District of New York and the jurisdiction of this Honorable Court.

2. That, upon information and belief and at all times hereinafter mentioned, the respondent, Canadian Pacific Steamships, Ltd., owned, operated and controlled a steam-

Exhibit A, Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

ship known as the "*Empress of Scotland*," a vessel of British registry and flying the flag of the United Kingdom.

(18) 3. That, upon information and belief and at all times hereinafter mentioned, the respondent, Canadian Pacific Railway Co., owned, operated, and controlled a steamship known as the "*Empress of Scotland*," a vessel of British registry and flying the flag of the United Kingdom.

4. That at all times hereinafter mentioned, the libellant, Evelyn Mc Afoos, was lawfully and properly a member of the entertainment crew and staff and business visitor aboard the vessel, "*Empress of Scotland*".

5. That on or about March 3rd 1955, while the said vessel was in the port of New York, libellant, Evelyn Mc Afoos, was lawfully aboard the said vessel, as aforesaid, and proceeding with due care and caution.

6. That by reason of the negligence of the respondent, their servants, agents and employees, and by reason of unsafe conditions on the said vessel, on or about March 3, 1955, libellant, Evelyn Mc Afoos, suffered severe injuries when she was caused to fall through an opening of the said vessel to the lower hold of the "*Empress of Scotland*".

7. That on or about the aforesaid date, libellant Evelyn Mc Afoos, was caused to fall through an opening of the said vessel, to the lower hold thereof, by reason of unseaworthy condition of the said vessel, and suffered severe and painful injuries thereby.

8. That said injuries were caused directly by (19) reason of the negligence of respondents, their agents, servants and employees in that they failed and neglected to supply the libellant, Evelyn Mc Afoos, with safe and seaworthy surroundings and facilities on the vessel, failed to

Exhibit A, Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

supply libellant, Evelyn Mc Afoos, with a sufficient number of crew and officers, failed to properly instruct libellant, Evelyn Mc Afoos, failed to properly superintend and supervise activities at the time said libellant was injured, and prior thereto, failed to promulgate and enforce proper and safe rules for the safe conduct of said work, failed to properly and adequately light the vessel, failed to warn libellant, Evelyn Mc Afoos, of the impending dangers, and failed to supply said libellant with a seaworthy vessel and safe and proper surroundings and to maintain the same in good and seaworthy condition.

9. That the aforesaid injuries were not caused by or the result of any fault or want of due care on the part of libellant.

10. That by reason of the injuries sustained, libellant, Evelyn Mc Afoos, has suffered damages in the amount of $150,000.00.

As and For a Second Cause of Action.

11. Libellant, Evelyn Mc Afoos, repeats and realleges each and every allegation hereinto set forth with the same force and effect as if same were again set forth in full.

12. Upon said libellant's becoming ill and injured as aforesaid, it became the duty of the Respondents to furnish (20) libellant, Evelyn Mc Afoos, with prompt medical care, attention and medicines at the expense of its maintenance and cure.

13. That respondents have neglected and failed to pay her the expense of her maintenance and cure while incapacitated; that the said amount of the maintenance and cure accrued will as the reasonable amount of maintenance and cure which may be expected, amount to $10,000.00, no part of which has been paid although duly demanded.

Exhibit A, Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

As and for a third cause of action on behalf of William Neff, libellant.

14. Libellant, William Neff, repeats and realleges each and every allegation hereinto set forth with the same force and effect as if same were again set forth in full.

15. That at all times herein mentioned, libellant, William Neff, had a business relation with Evelyn Mc Afoos, which was known to respondents aboard whose vessel libellants were entertainers.

16. That solely by reason of respondent's negligence, its servants, agents and/or employees, and/or the unseaworthiness of its vessel, and the injuries sustained by libellant, Evelyn Mc Afoos, as a result thereof, William Neff has been caused to suffer substantial monetary loss due to the breach of his business relationship, and has expended divers sums of money as a result thereof.

17. That by reason of the aforesaid, libellant, William Neff, has been damaged in the sum of $15,000.00.

(21) WHEREFORE, all and singular the aforesaid are true and within the admiralty and maritime jurisdiction of the United States in this Admiralty Court, libellants pray that due process be issued in the form of law according to the rules and practice of this Admiralty Court in cases of admiralty and maritime jurisdiction against the respondents citing them to appear and answer all and singular the aforesaid matters, and if the respondents cannot be found within this district, the vessel of respondents, "*Empress of Scotland*," or any other vessels, goods or credits that may be found within this district may be attached for the amount sued for with the interests and costs, that such of the foregoing as may be found within the district may be attached, that the vessel may be appro-

Exhibit A, Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

priated, condemned and sold to pay for the same and that this Court may direct payment by respondents to libellants in the sum of $150,000.00 in the first cause of action, $10,000.00 in the second cause of action, and $15,000.00 in the third cause of action, plus such additional sums as may be due for costs and interests thereon, the same being the amount sued for herein.

That process and due form of law according to the practice of this Honorable Court in cause of admiralty and maritime jurisdiction issue against the said vessel, "*Empress of Scotland*," her engines, boilers, etc., and that all persons claiming any right, title or interest in the said vessel may be cited to appear and answer all and singular the matters aforesaid and that the said vessel may be sold to pay for the demands as aforesaid with interest and costs.

(22) That this Court order, adjudge, and decree that the said respondents and vessel, "*Empress of Scotland*," pay to libellants the damages suffered by them, together with interest thereon and disbursements herein.

And that libellants have such other and further relief in the premises as in law and justice they may be entitled to receive.

Dated, New York, N. Y.
September 15, 1955.

SIDNEY ROFFMAN,
Proctor for Libellants,
Office & P. O. Address,
225 Broadway,
Borough of Manhattan,
City of New York.

COOPER, OSTRIN & DE VARCO,
Of Counsel,
655 Madison Avenue,
New York 21, New York.

Exhibit A, Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

(23) STATE OF NEW YORK }
COUNTY OF ONONDAGO } ss.:

EVELYN MC AFOOS, being duly sworn, deposes and says that she is the libellant in the within action; that she has read the foregoing Libel and Complaint and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

EVELYN MC AFOOS

Sworn to before me this
1st day of September, 1955.

MARGARET M. MARRA

MARGARET M. MARRA
Notary Public in the State of New York
Qualified in Onon. Co. No. 34-2596250
My Commission Expires March 30, 1957

Exhibit A, Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

(24) STATE OF NEW YORK
COUNTY OF ONONDAGO } ss.:

WILLIAM NEFF, being duly sworn, deposes and says:

That he is the libellant in the within action.

That he has read the foregoing Libel and Complaint and knows the contents thereof.

That the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

WILLIAM NEFF

Sworn to before me this
1st day of September, 1955.

MARGARET M. MARRA

MARGARET M. MARRA
Notary Public in the State of New York
Qualified in Onon. Co. No. 34-2596250
My Commission Expires March 30, 1957

Exhibit B, Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

Summons and Complaint.

(25) SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EVELYN MC AFOOS and WILLIAM NEFF,
Plaintiffs,
v.
THE CANADIAN PACIFIC STEAMSHIP, LTD., and the CANADIAN PACIFIC RAILWAY CO.,
Defendants.

Plaintiff Demands a Trial by Jury.

Summons.

To the above named Defendant:

You are hereby summoned and required to serve upon Cooper, Ostrin & De Varco, plaintiffs' attorneys, whose address 655 Madison Avenue, New York 21, New York, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM V. CONNELL,
Clerk of Court

JOHN O. LIVINGSTON,
Deputy Clerk

Date: New York, New York
October 25, 1955

[SEAL OF COURT]

NOTE: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Exhibit B, Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

(26) UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EVELYN McAFOOS and WILLIAM NEFF,
Plaintiffs,
against
THE CANADIAN PACIFIC STEAMSHIPS, LTD., and the CANADIAN PACIFIC RAILWAY CO.,
Defendants.

Plaintiff Demands a Trial by Jury.

ACTION UNDER SPECIAL RULE FOR SEAMEN TO SUE WITHOUT SECURITY AND PREPAYMENT OF FEES. 28 U. S. CODE 1916.

Plaintiff, by her attorney, Sidney Roffman, complaining of defendants, respectfully alleges:

1. Upon information and belief, and at all times hereinafter mentioned, the defendants and each of them were corporations doing business in the City of New York with offices and principal places of business, among others, located at 581 Fifth Avenue, in the Borough of Manhattan, City and State of New York.

2. On information and belief, and at all times hereinafter mentioned, the defendant, Canadian Pacific Steamships, Ltd., owned, operated and controlled a steamship known as the SS. "*Empress of Scotland*".

3. Upon information and belief, and at all times hereinafter mentioned, defendant Canadian Pacific Railway Company, owned, operated and controlled a steamship known as the SS. "*Empress of Scotland*".

4. At all times hereinafter mentioned, the plaintiff was a crew member on the entertainment staff and was law-
(27) fully and properly a business visitor on the vessel,

Exhibit B, Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

"*Empress of Scotland,*" as an entertainer pursuant to agreement between her and the defendants herein.

5. That on or about March 3, 1955, while the said vessel was in the Port of New York, plaintiff was aboard the said vessel as aforesaid and proceeding with care and caution.

6. That by reason of the negligence of the defendants, their servants, agents and employees, and by reason of unsafe conditions on the said vessel, on or about March 3, 1955, plaintiff, Evelyn McAfoos, suffered severe injuries when she was caused to fall through an opening of the said vessel to the lower hold of the "*Empress of Scotland*".

7. That on or about the aforesaid date, plaintiff, Evelyn McAfoos, was caused to fall through an opening of the said vessel, to the lower hold thereof, by reason of the unseaworthy condition of the said vessel, and suffered severe and painful injuries thereby.

8. That on or about the aforesaid date, plaintiff was caused to fall through an opening in one of the lower decks of the vessel, to the lower hold thereof, by reason of the unseaworthy condition of the said vessel, and suffered severe and painful injuries thereby.

9. That said injuries were caused directly by reason of the negligence of defendants, their agents, servants, and employees in that they failed and neglected to supply plaintiff with a sufficient number of competent employees, co-employees, and superior officers; failed to properly superintend and supervise work going on at the time plaintiff was injured, and prior thereto; failed to promulgate and enforce proper and safe rules for the safe conduct of said work; failed to warn plaintiff of the impending dangers, and failed to supply plaintiff with safe and proper (28) surroundings and to maintain the same in a safe and seaworthy condition.

Exhibit B, Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

10. That the aforesaid injuries were not caused by or the result of any fault or want of due care on the part of plaintiff.

11. That suit herein is brought under the General Maritime Law as amended by Statute, and in particular the Jones Act 46 U. S. Code 688; but not limited thereto.

12. That by reason of the injuries sustained, plaintiff has suffered damages in the amount of $150,000.00.

As and for a second cause of action.

13. Plaintiff, EVELYN MCAFOOS, repeats and realleges each and every allegation hereinto set forth with the same force and effect as if same were again set forth in full.

14. Upon said plaintiff's becoming ill and injured as aforesaid, it became the duty of the defendants to furnish plaintiff with prompt medical care, attention and medicines at the expense of its maintenance and cure.

15. That defendants have neglected and failed to pay her the expense of her maintenance and cure while incapacitated; that the said amount of the maintenance and cure accrued, will as the reasonable amount of maintenance and cure which may be expected to amount to Ten Thousand ($10,000) Dollars, no part of which has been paid, although duly demanded.

As and for a third cause of action on behalf of William Neff, Plaintiff.

16. Plaintiff, WILLIAM NEFF, repeats and realleges each and every allegation hereinto set forth with the same force and effect as if same were again set forth in full.

Exhibit B, Annexed to Affidavit of Dennis P. Donovan, Read in Support of Motion.

17. That at all times herein mentioned, plaintiff WILLIAM NEFF, had a business relationship with EVELYN McAFOOS which was known to defendants aboard whose vessel plaintiffs (29) were entertainers.

18. That solely by reason of defendants negligence, its servants, agents and/or employees, and/or the unseaworthiness of its vessel, and the injuries sustained by plaintiff, EVELYN McAFOOS, as a result thereof, WILLIAM NEFF has been caused to suffer substantial monetary loss due to the breach of his business relationship, and has expended divers sums of money as a result thereof.

19. That by reason of the aforesaid, plaintiff, WILLIAM NEFF, has been damaged in the sum of Fifteen Thousand ($15,000.00) Dollars.

WHEREFORE, plaintiffs demand judgment against the defendants for the sum of One Hundred and Fifty Thousand ($150,000.00) Dollars on plaintiff, EVELYN McAFOOS' first cause of action and Ten Thousand ($10,000.00) Dollars on plaintiff, EVELYN McAFOOS' second cause of action and Fifteen Thousand ($15,000.00) Dollars on plaintiff WILLIAM NEFF's, third cause of action making in all the total sum of One Hundred and Seventy-five Thousand ($175,000.00) Dollars, together with the costs and disbursements of this action.

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No. ~~1128~~ 223

Office - Supreme Court, U.S.
FILED
JUN 25 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE CANADIAN PACIFIC STEAMSHIPS, LTD., and
THE CANADIAN PACIFIC RAILWAY CO.,
Petitioners,

against

EVELYN McAFOOS and WILLIAM NEFF,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

LIVINGSTON PLATT,
Counsel for Petitioners,
120 Broadway,
New York, N. Y.

DENNIS P. DONOVAN,

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"Commentary on Maritime Workers" reported immediately prior to the Jones Act in Title 26 U. S. C. A. 688, and particularly at pages 229 through 232 6

IN THE

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THE CANADIAN PACIFIC STEAMSHIPS, LTD., and THE CANADIAN PACIFIC RAILWAY CO.,

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EVELYN McAFOOS and WILLIAM NEFF,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners (hereinafter called defendants) pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled matter on April 2, 1957, reversing the judgment of dismissal of the complaint of respondents (hereinafter called plaintiffs) entered pursuant to the order of the United States District Court for the Southern District of New York.

The Opinions of the Courts Below.

The opinion of the District Court, by Judge Levet, is reported in 143 F. Supp. 73, and is printed in the Appendix hereto (12-16)*. The opinion of the United States Court of Appeals for the Second Circuit, by Judge Clark, is not yet reported, and is printed in the Appendix hereto (17-24).

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on April 2, 1957, and is printed in the Appendix hereto (25).

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

Questions Presented.

1. Whether plaintiff McAfoos may, in view of the election requirement contained in the Jones Act (46 U. S. C. 688), maintain under that Act two suits for the same relief, one suit being in admiralty and the other being at law.

2. Whether plaintiff McAfoos may, in view of the election requirement contained in the Jones Act, combine under that Act claims predicated on (1) unseaworthiness, and (2) negligence.

---

* References herein to the appendix in this court are by page number. References herein to the appendixes in the Court of Appeals (as numbered by the Clerk of that Court) are by page number followed by the letter a.

3. Whether the United States Court of Appeals for the Second Circuit properly held that it is not unduly vexatious to compel the defendants to defend two separate suits in the Southern District of New York commenced by the same plaintiff and predicated on identical causes of action.

Statute Involved.

The statutory provision involved is the Jones Act, 46 United States Code, 688, which provides as follows:

> "Recovery for injury to or death of seaman.
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat 1007."

Statement of the Case.

The complaint herein bases jurisdiction of the District Court on the Jones Act alone (23a). After the District Court rendered its decision, plaintiffs indicated an intent

to amend the complaint so as to allege diversity of citizenship, but no amended complaint has ever been served.

Plaintiffs instituted two actions in the Southern District of New York to recover for the same alleged damages. Suit in admiralty was commenced by filing a libel (13a-17a) on September 21, 1955. Libel was served on the defendants on September 22, 1955 (9a). Subsequently and on October 25, 1955, this civil action was commenced by filing the complaint herein (21a-24a) which complaint was served on defendants on October 26, 1955 (9a).

The allegations of the libel and complaint are substantially identical, each pleading containing the same three claims. The first alleged claim in both the libel and the complaint is by plaintiff, Evelyn McAfoos, who alleges that she suffered personal injury as the result of the alleged negligence of defendants, and the alleged unseaworthiness of the vessel SS. "*Empress of Scotland*". Plaintiff McAfoos alleges she was a member of the crew of the "*Empress of Scotland*" and claims damages in the amount of $150,000.

The second alleged claim in both the libel and the complaint is for $10,000 maintenance and cure alleged to be due plaintiff McAfoos.

The third alleged claim in both the libel and the complaint is by plaintiff William Neff. He alleges that he had a business relationship with Evelyn McAfoos which was curtailed by her injuries caused by defendants' negligence and the unseaworthiness of the "*Empress of Scotland*" as result of which he claims damages in the amount of $15,000.

Defendants moved in the District Court to dismiss the complaint in this action at law on the grounds (a) that the commencement of the suit in admiralty by plaintiffs constituted an election under the Jones Act; (b) that plaintiffs failed to elect between a claim based on unseaworthiness and a claim based on negligence; and (c) that there was

another action pending in the same court for the same relief sought in the complaint (7a-8a). The District Court granted defendants' motion and held that election under the Jones Act meant an election between a suit in admiralty and an action at law; that here such election was made by the plaintiffs when the suit in admiralty was commenced; and that to require the defendants to defend this action at law in view of the identical suit in admiralty would be unduly vexatious (15-16).

The plaintiffs appealed to the United States Court of Appeals for the Second Circuit, which Court reversed the District Court's determination and remanded the action for further proceedings. The Court of Appeals held that while the election referred to in the Jones Act was an election between a suit in admiralty and an action at law, the plaintiffs here did not make such election when they commenced their suit in admiralty, and that the prosecution by plaintiffs of the two actions in the same court was not unduly vexatious (23-24).

Reasons for Granting a Writ.

The important basic question presented by this petition is what specifically is meant by the phrase "at his election" as it appears in the Jones Act. This Court has not passed squarely on this clause. Although this petition does not involve a final judgment, it does present an important and clear-cut issue of Federal law which has not been decided by this Court, as to which there is substantial conflict and confusion in the lower courts, and which issue is fundamental to the further conduct of this case. In these circumstances, even though judgment below is not final, certiorari is proper. *Supreme Court Practice,* Second Edition, Stern and Gressman, page 130.

History of the Problem.

The meaning of the phrase "at his election" contained in the Jones Act has been given different interpretations by various courts. Historically, and prior to the enactment of the Jones Act this Court in the case of *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372 (1918) referred to the election problem later to be created by adding to the rights of seamen the right to sue for personal injury caused by negligence. The *Chelentis* case "pointed the way" to the Jones Act. ["Commentary on Maritime Workers" reported immediately prior to the Jones Act in Title 26 U. S. C. A. 688, and particularly at pages 229 through 232.] In that case the Court said, while construing a "saving to suitors" clause (247 U. S. 372, 384):

> "Plainly, we think, under the savings clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common law standards rather than those of the maritime law."

After the passage of the Jones Act in 1920, it was assumed that the election referred to therein was an election between a claim based on the maritime theory of unseaworthiness and a claim based on the common law theory of negligence. Illustrative cases are:

Panama R. R. Co. v. *Johnson*, 264 U. S. 375 (1924);
Engel v. *Davenport*, 271 U. S. 33 (1926);
Plamals v. *Pinar Del Rio*, 277 U. S. 151 (1928);
Pacific Steamship Co. v. *Peterson*, 278 U. S. 130 (1928).

Thus, in the *Pinar Del Rio* case, this Court said (277 U. S. 151, 156-157):

> "Seamen may invoke, at their election, the relief accorded by the old rules against the ship; or that provided by the new against the employer. But they may not have the benefit of both."

The cases held that the election between an action based on unseaworthiness and an action based on negligence is made when the initial pleading is filed. *Kuhlman* v. *W. & A. Fletcher Co.*, Third Circuit, 20 F. 2d 465 (1927); cf *Skolar* v. *Lehigh Valley Railroad Co.*, Second Circuit, 60 F. 2d, 893 (1932). Thus in the *Kuhlman* case the Court said (20 F. 2d, 465, 467):

> "Having thus elected the statutory remedy by instituting the suit at law, the plaintiff had no right later to amend his pleading and transfer his action from the law side of the Court to its admiralty side. He was bound by his election."

The Third Circuit took the first step in departing from the theretofore accepted concept of the Jones Act election. *McCarthy* v. *American Eastern Corporation*, 175 F. 2d, 724 (1949), Cert. denied, 338 U. S. 868. That case specifically held that the election referred to did not require a choice between the theory of negligence and the theory of unseaworthiness. In reaching its conclusion the Third Circuit Court particularly relied on the case of *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316 (1926), a *res judicata* case wherein this Court never mentioned election. In the *McCarthy* case the Court said (175 F. 2d, 724, 726):

> "In our view the election to which the Jones Act refers is an election of remedies as between a suit in admiralty and a civil action."

The Second Circuit was one of the number of circuits to follow the *McCarthy* case. In the case of *Balado* v. *Lykes Bros. S. S. Co.*, 179 F. 2d. 943 (1950), at page 945, the Second Circuit Court said:

> "In our opinion, election is required by the Jones Act only between a trial by jury and a suit in admiralty. Here that election was made when the plaintiff brought his action at law under the Jones Act."

Thus, although the choice presented by the election was changed by judicial decision in various circuit courts, the requirement that the election be made at the outset of the litigation still appeared firmly established; and the District Courts have so held. *Jonassen* v. *Norwegian American Line*, 105 F. Supp. 510; S. D. N. Y. (1952); *Murphy* v. *American Barge Line Co.*, 93 F. Supp. 653, W. D. Penn. (1950); *Contra*, *Stalker* v. *Southeastern Oil Co.*, 103 F. Supp. 436 Del. (1951). But now, in the case at bar, the Second Circuit appears to have held that the election need never be made so long as there are not two recoveries. Thus according to the court below a seaman may maintain two actions for the same relief, one in law and one in admiralty, and in each action he may base his claim on both unseaworthiness and negligence.

The Decision Below Is Erroneous.

The Second Circuit Court has read out of the Jones Act any requirement of election. This fact is clearly demonstrated by the cases cited and relied upon by the Circuit Court in its decision. The basic reasoning of the Court is that since it has been held that the Jones Act action may be transferred from the admiralty to the law side of

the court, the election between an action at law and a suit in admiralty need not be made at the time the initial pleading is filed. To support the proposition that a Jones Act action can be transferred from the admiralty side to the law side the Court relies on two decisions: *O'Neill* v. *Cunard White Star*, Second Circuit 160 F. 2d, 446 (1947), and *Civil* v. *Waterman S. S. Co.*, Second Circuit 217 F. 2d, 94 (1954). Although in each of those Jones Act cases such a transfer was permitted, the cases are death actions. The Jones Act creates two distinct rights. As to actions for personal injuries it provides in pertinent part:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury****"

A separate and distinct right of action is created for the benefit of personal representatives of the seaman in the event of the wrongful death of the seaman. This portion of the Jones Act which follows the semi-colon in the first sentence thereof provides in pertinent part:

> "in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury****"

It can be readily seen that the death action portion of the Jones Act contains no requirement of an election. In other words, by relying on death action cases to support the proposition that this action could be transferred from the law side to the admiralty side, the Court indicates that the language "at his election" contained in the Jones Act (as to a seaman's action but not as to the personal representative's death action) is mere surplusage and of no effect.

The present construction of the Jones Act made by the Court below which renders meaningless the specific statutory language "at his election" is clearly erroneous. As was said by this Court in *United States v. Menasche*, 348 U. S. 528 (1954) 538-539:

> "'The cardinal principle of statutory construction is to save and not to destroy.' Labor Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1, 30. It is our duty 'to give effect, if possible, to every clause and word of a statute,' Montclair *v.* Ramsdell, 107 U. S. 147, 152, rather than to emasculate an entire section***."

The Question Is of General Importance.

As pointed out above, page 7, the decision of the Circuit Court in the case at bar is in conflict with the decision of the Third Circuit in the *Kahlman* case as to when election must be made and is also in conflict with the language of this Court in the *Pinar Del Rio* case, and the other cases cited, supra, page 6, as to what election is required by the Jones Act. In addition to these conflicts, the meaning of the Jones Act election requirement is a question of great importance since it involves basic construction of one of the more frequently invoked remedial Federal statutes. From a practical point of view, the apparent elimination of the election requirement by the Circuit Court here could substantially double the large number of Jones Act actions pending. It would be quixotic for a plaintiff's attorney not to invoke every remedy now held available to a plaintiff seaman and to invoke those remedies in both the law courts and the courts of admiralty, for at this stage it would indeed be a rash counselor who would stake a client's rights on any legal opinion as to the election requirements of the

Jones Act. The law on the subject is in flux and the mere existence of that flux could well cause substantial injustice to litigants. The matter should now be set to rest by this Court so as to avoid such consequences.

Conclusion.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

LIVINGSTON PLATT,
Counsel for Petitioners.

DENNIS P. DONOVAN,
ERNEST S. BALLARD, JR.,
Of Counsel.

APPENDIX.

Opinion of United States District Court, Southern District of New York.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EVELYN MC AFOOS and WILLIAM NEFF,
Plaintiffs,

against

THE CANADIAN PACIFIC STEAMSHIPS, LTD., and the CANADIAN PACIFIC RAILWAY CO.,
Defendants.

OPINION
Civil 101-218

Appearances:

COOPER, OSTRIN & DEVARCO, Attorneys for plaintiffs, 655 Madison Avenue, New York 21, N. Y., RICHARD GYORY, of Counsel.

BLEAKLEY, PLATT, GILCHRIST & WALKER, Attorneys for Defendants, 120 Broadway, New York 5, N. Y., ERNEST S. BALLARD, JR., of Counsel.

LEVET, D. J.

This is an action under the Jones Act, 46 U. S. C. A. 688, to recover for personal injuries claimed to have been sustained by plaintiff, Evelyn Mc Afoos, as a result of the alleged negligence of the defendants and the unseaworthiness of the vessel, the SS. *Empress of Scotland*. The

complaint also includes a claim for maintenance and cure. Plaintiff Mc Afoos is a magician's assistant, and plaintiff, William Neff, is a magician. They alleged that while they were employed by the defendants as members of the entertainment crew and staff of the SS. *Empress of Scotland*, plaintiff Mc Afoos fell through an open hatch on said vessel. Plaintiff Neff seeks to recover for the curtailment of his business relationship with Evelyn Mc Afoos, alleged to have been caused by defendants' negligence and the unseaworthiness of the aforesaid vessel.

Defendants have moved to dismiss the complaint on the ground that prior to the institution of this action, the plaintiffs had commenced an admiralty action (No. 186-206) against the same defendants for the identical causes of action as alleged herein and that said action is presently pending in this Court. Defendants' motion to dismiss the complaint is predicated on the theory that the commencement of the suit in admiralty by plaintiffs constituted an election of remedies under the Jones Act, and on the further ground that there is another action pending in this Court for the same relief as is sought herein. Plaintiffs argue that no election had been made by them because they did not incorporate the Jones Act in their admiralty suit and that they did not allege in said suit that they were employed by the defendants.

Although plaintiffs contend that in their admiralty suit they have not alleged facts relating to employment, it is clear that they are relying upon an employer-employee relationship in said suit. Plaintiff Mc Afoos alleges in the admiralty suit that she was a member of the entertainment crew and staff of the SS. *Empress of Scotland*, and, in addition to her other claims, she seeks to recover in said suit for maintenance and cure. The right to maintenance and cure is conferred by general maritime law and is contractual in the sense that it has its origin in, and is an incident to, the contract of employment. *Cortes v. Baltimore Insular Line*, 287 U. S. 367. It is a right given by general maritime law in consequence of the seaman's status

under his contract of employment between the seaman and the shipowner. The term "seaman" is not limited to those who can "hand, reef, and steer" and has been extended to include a person employed as an entertainer on board a vessel. *The Sea Lark*, D. C. Wash. 1926, 14 F. 2d 201.

Plaintiffs have also alleged in their admiralty suit a cause of action for negligence on the part of the defendants, their agents and employees. Plaintiffs now claim that they do not rely upon the Jones Act in said suit. It should be observed that, absent the relief provided by the Jones Act, a seaman cannot sue a shipowner in admiralty for negligence. *The Osceola*, 189 U. S. 158.

Manifestly, if plaintiffs are permitted to proceed in both actions, a judgment in one is *res judicata* with respect to the other. *Baltimore SS. Co.* v. *Phillips*, 274 U. S. 316. Plaintiffs cannot expect to obtain a double indemnity by fostering twin actions. The issue presented here, however, is whether plaintiffs are deemed to have elected to pursue their rights in admiralty rather than at law.

The Jones Act, 46 USCA 688, provides that "Any seaman who shall suffer personal injury in the course of his employment may, *at his election*, maintain an action for damages at law, with the right of trial by jury * * *." (Emphasis added.) Prior to the enactment of the Jones Act in 1920, a vessel and its owners were liable in admiralty to seamen who were injured in the service of the ship for their wages, maintenance and cure, and compensation for injuries received as a result of the unseaworthiness of the ship or its equipment. *The Osceola*, 189 U. S. 158. The seamen could not recover an indemnity for the negligence of the master, or any member of the crew, beyond maintenance and cure. *The Osceola*, *supra*. In any personal injury action for damages brought by seamen prior to the Jones Act, the affirmative defenses of assumption of risk, the fellow-servant rule, or contributory negligence, could be availed of by the employer. The Jones Act permits injured seamen, at their election, to maintain an action at law for damages for personal injury caused by the negligence of

the employer and the aforementioned affirmative defenses were abolished. A seaman's right to elect to sue under the Jones Act also extends to suits in admiralty. See *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375.

It is now also well established that a plaintiff may claim damages under the Jones Act for negligence, or under the maritime law for unseaworthiness and that he may join both causes of action in a single suit without being deemed to have made an election between them. *McCarthy* v. *American Eastern Corporation*, 3 Cir. 1949, 175 F. 2d 727; *Balado* v. *Lykes Bros. S.S. Co.*, 2 Cir. 1950, 179 F. 2d 943; *Yates* v. *Dann*, 3 Cir. 1955, 223 F. 2d 64; *Williams* v. *Tide Water Associated Oil Company*, 9 Cir. 1955, 227 F. 2d 791. The election contemplated by the Jones Act is "between a trial by jury and a suit in admiralty". *Balado* v. *Lykes Bros. S.S. Co.*, *supra*, at page 945. Thus, it is said that an injured seaman has three remedies: "(1) In admiralty against the ship, without benefit of the Jones Act; (2) At law against the shipowners and under the Jones Act or any other branch of the maritime law; (3) In admiralty against the shipowners and under the Jones Act or any other branch of the maritime law". *Platt* v. *Chesapeake & O. Ry. Co.*, D. C. Ohio 1948, 82 F. Supp. 968, 974.

In the case at bar the plaintiffs clearly indicated by commencing their admiralty suit that they elected to sue in admiralty against the shipowners rather than at law. Their position is not unlike that of the plaintiff in *Murphy* v. *American Barge Line Co.*, D. C. W. D. Pa. 1950, 93 F. Supp. 653, where an injured seaman instituted a civil action against the owner of a vessel, alleging negligence and unseaworthiness. He thereafter filed a libel against the same owner for the same causes of action as asserted in the civil action. The Court held that the seaman made an election when he commenced his civil action and, therefore, dismissed the admiralty suit. Since the recovery which the plaintiffs seek in this action is identical to that which is sought in their admiralty action, they are deemed to have made their election when they filed their suit in admiralty.

See *Jonassen* v. *Norwegian American Lines, Inc.*, D. C. S. D. N. Y. 1952, 105 F. Supp. 510. To require the defendants to plead to and defend two separate suits commenced by the same plaintiffs against the same defendants predicated on identical causes of action would be unduly vexatious. See *Paluchowska* v. *United States Lines, Inc.* D. C. S. D. N. Y. 1950, 93 F. Supp. 751.

Defendants' motion to dismiss the complaint is, therefore, granted.

Settle order on notice.

Dated: New York, N. Y.
July 5, 1956

RICHARD H. LEVET
United States District Judge

Opinion of United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 116—October Term, 1956.

(Argued January 10, 1957 Decided April 2, 1957.)

Docket No. 24278

EVELYN MCAFOOS and WILLIAM NEFF,

Plaintiffs-Appellants,

—v.—

THE CANADIAN PACIFIC STEAMSHIPS, LTD., and THE CANADIAN PACIFIC RAILWAY CO.,

Defendants-Appellees.

Before:

CLARK, *Chief Judge*, and LUMBARD and WATERMAN, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Richard H. Levet, *Judge*.

Evelyn McAfoos, an entertainer aboard the defendants' ocean-going vessel, appeals from a decision, D. C. S. D. N. Y., 143 F. Supp. 73, dismissing her complaint under the Jones Act, 46 U. S. C. §688, on the ground that, since she had filed a libel for the same injuries in the same court a month earlier, she had "elected" to sue in admiralty. William Neff, her employer, also appeals from the same deci-

sion dismissing his derivative claim for business loss caused by Miss McAfoos' injury. Reversed and remanded.

RICHARD GYORY, of Cooper, Ostrin & De Varco, New York City (Sidney Roffman, New York City, on the brief), for *plaintiffs-appellants*.

ERNEST S. BALLARD, JR., of Bleakley, Platt, Gilchrist & Walker, New York City (Dennis P. Donovan, of Bleakley, Platt, Gilchrist & Walker, New York City, on the brief), for *defendants-appellees*.

CLARK, *Chief Judge*:

This is an appeal from a decision, D. C. S. D. N. Y., 143 F. Supp. 73, dismissing an action under the Jones Act, 46 U. S. C. 688, on the ground that there was already pending an earlier instituted libel in admiralty for the same recovery. On this appeal the parties also have presented the issue as one of "election" between a civil action "at law" and a suit in admiralty, although this conceals the more fundamental question of the manner and time in which jury trial is waived.

Plaintiff McAfoos, who was employed as a magician's assistant aboard the vessel "Empress of Scotland," allegedly suffered personal injuries when she fell through an opening in the hold of the vessel while it lay berthed in the Port of New York. She claimed[1] that the boards which normally furnished the deck of the hold had been removed by crew members and not replaced. Thus liability might be predicated on either unseaworthiness or the negligence of the crew members. Although Miss McAfoos enjoyed the social status of a ship's officer, she never signed the ship's articles, was reported to have been listed by the ship as a passenger, and was paid by her employer, co-plain-

[1] More fully disclosed by the affidavits submitted by appellants in the district court on application for reargument, and necessarily before us as "original papers" under our Rule 11(b) and F. R. C. P., rule 75(o). We do not know of any basis for appellees' objection to appellate consideration of these documents.

tiff Neff, rather than by the shipowner. On trial she might be proved to be a seaman, a passenger, or a business invitee.

Her ambiguous legal status and the nature of the accident posed a procedural dilemma for the plaintiff at the threshold of the suit. If it should be held later that she was not a "seaman" she could not avail herself of the Jones Act, e.g., *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187; nor could she recover maintenance and cure, *Calvino* v. *Farley*, D. C. S. D. N. Y., 23 F. Supp. 654. Perhaps, although not a seaman, she could nevertheless hold the shipowners liable for the negligence of the crew or the unseaworthiness of the vessel, i.e., *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; but no diversity of citizenship was alleged here, and without such an allegation it is not clear whether or not these theories can be pursued in a federal court. See *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 2 Cir., 234 F. 2d 253, 257. But in a state court she could not proceed *in rem* against the vessel, e.g., *The Glide*, 167 U. S. 606. If she decided to sue in a federal court, she still would have the choice of a civil action, a suit in admiralty, or both. In admiralty both *in rem* and *in personam* claims could be pursued in the same action, *The Isonomia*, 2 Cir., 285 F. 516, 520; but only in a civil action could she try issues to a jury.

Sensing these doctrinal—or at least semantic—obstacles to easy victory, plaintiff's attorney commenced suit by filing a libel in the federal district court against the vessel and the shipowners, alleging negligence, unseaworthiness, and a claim for maintenance and cure, and describing Miss McAfoos as alternatively a crew member or a business invitee. The Jones Act, although not mentioned by name in the libel, was pleaded, since recovery in admiralty was sought for the negligence of crew members and such recovery would have been impossible without the statute. *Engel* v. *Davenport*, 271 U. S. 33, 36; *Hammond Lumber Co.* v. *Sandin*, 9 Cir. 17 F. 2d 760, 762, certiorari denied 274 U. S. 756. A month later plaintiff's lawyer filed a civil complaint against the shipowners in the same district court,

alleging the same facts and theories; this time the Jones Act was mentioned by name and jury trial was asked on all issues.

Before the defendants filed an answer Judge Levet granted their motion, dismissing the complaint as unduly vexatious and because plaintiff by filing a libel had already irrevocably elected to sue in admiralty instead of at law. D. C. S. D. N. Y., 143 F. Supp. 73. Thus plaintiff was left to proceed solely in admiralty, that is, without jury trial.

Inasmuch as the libel and complaint pending simultaneously in the same court were substantially identical, there was no serious apprehension that the plaintiff sought two trials or two recoveries. In fact plaintiff offered to consolidate the actions for trial, making it clear that the second suit was only a procedural device to preserve jury trial. Perhaps confusion would have been avoided or lessened had plaintiff not filed a complaint, but instead moved to transfer the *in personam* claims to the civil side of the court for trial to a jury. The *in rem* claims and any *in personam* theories not cognizable at law would not be lost by such a transfer, of course, but would be preserved in admiralty; and both sets of claims could be pressed simultaneously at the trial.

Actually the complaint, filed with the court and served on the defendants, gave all concerned adequate notice that plaintiff was seeking jury trial on all possible issues; and it should make no difference under either the Admiralty Rules or the Federal Rules of Civil Procedure whether at that initial stage of pleading plaintiff demanded jury trial by motion to transfer or by what was technically a second action. Hence our inquiry must be whether plaintiff could have preserved jury trial by such a motion at this stage of the action. A long line of decisions has established the propriety of treating cases begun by libels as actions "at law"—or presently "civil actions"—where there is federal jurisdiction to sustain the suit on the civil side, e.g., *In re Confiscation Cases*, 87 U. S. (20 Wall.) 92, 109-110; *U. S. ex rel. Pressprich & Son Co.* v. *James W. Elwell & Co.*, 2 Cir., 250 F. 939, certiorari denied 248 U. S. 564; *Cory Bros. & Co.* v. *United States*, 2 Cir., 51 F. 2d 1010; *Prince*

Line v. *American Paper Exports, Inc.*, 2 Cir., 55 F. 2d 1053; *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*; *supra*, 2 Cir., 234 F. 2d 253, 257 note 5. And we have similarly treated an action begun by a civil complaint as a suit in admiralty. *O'Neill* v. *Cunard White Star*, 2 Cir., 160 F. 2d 446, certiorari denied 332 U. S. 773. This power to shift a case from one "side" of the court to another is not limited to situations where one side has jurisdiction and the other has not, *Civil* v. *Waterman S. S. Corp.*, 2 Cir., 217 F. 2d 94; nor does the district court have unlimited discretion to deny transfer between sides, *O'Neill* v. *Cunard White Star*, *supra*, 2 Cir., 160 F. 2d 446.

Appellee's principal contention is that suits under the Jones Act are not transferable like ordinary suits, because the statute requires an "election" between law and admiralty and this election is made when the plaintiff files his first pleading.[2] Two other district court judges and the judge below have read our opinion in *Balado* v. *Lykes Bros. S. S. Co.*, 2 Cir., 179 F. 2d 943, 945, as approving this construction of the statute. See *Jonassen* v. *Norwegian Am. Line*, D. C. S. D. N. Y., 105 F. Supp. 510; *Murphy* v. *American Barge Line Co.*, D. C. W. D. Pa., 93 F. Supp. 653. But in the *Balado* case we held only that the election contemplated by the statute was between a suit in admiralty and a trial by jury and not, as there contended, between theories of negligence and theories of unseaworthiness. We did not mean to express an opinion as to the precise moment at which the election must be finally made, and the statute is equally silent on the point.

In *O'Neill* v. *Cunard White Star*, *supra*, 2 Cir., 160 F. 2d 446, and *Civil* v. *Waterman S. S. Corp.*, *supra*, 2 Cir., 217 F. 2d 94, we approved the transfer of Jones Act suits from law to admiralty—a result incompatible with the notion that the choice of side of the court is made irrevocably at the first pleading; at least one district court has allowed

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[2] The actual wording of the Jones Act, 46 U. S. C. §688, is: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury * * *."

the identical type of transfer involved here, from admiralty to law. *Nilsson* v. *American Oil Co.*, D. C. S. D. Tex., 118 F. Supp. 482.

The "election" contemplated by the Jones Act is primarily a decision as to the form of trial—whether jury or non-jury. *Bâlado* v. *Lykes Bros. S. S. Co.*, *supra*, 2 Cir., 179 F. 2d 943, 945. Ordinarily in cases transferred from admiralty to law this choice is governed by F. R. C. P., rule 38, treating jury trial as waived unless claimed within ten days after issue is joined. *James Richardson & Sons* v. *Conners Marine Co.*, 2 Cir., 141 F. 2d 226, 230; *United States* v. *The John R. Williams*, 2 Cir., 144 F. 2d 451, 454, certiorari denied *Great Lakes Dredge & Dock Co.* v. *United States*, 323 U. S. 782. Even before the adoption of the Federal Rules the choice between jury trial and trial to the court in transferred cases was not deemed irrevocable until issue was joined. *U. S. ex rel. Pressprich & Son Co.* v. *James W. Elwell & Co.*, *supra*, 2 Cir., 250 F. 939; *Prince Line* v. *American Paper Exports, Inc.*, *supra*, 2 Cir., 55 F. 2d 1053, 1057.

Experience has demonstrated the felicity of the ordinary federal procedure which requires a prompt claim of jury trial or at least shortly after issue is joined to preserve that more cumbersome and calendar-delaying form of trial. See Clark, Code Pleading 113-122 (2d Ed. 1947), and Advisory Committee Note to F. R. C. P. 38. But as there pointed out, under the federal practice and a quite usual state procedure jury trial is not waived by failure to make claim earlier and it may well be unfair, as it is unnecessary, to require earlier action. Such is the case here, where the risk of mistake in choosing a wrong legal theory might be costly indeed.

We think that Congress, by its silence as to the time when "election" must be made, intended that the time for seeking jury trial was to be governed by the ordinary rules of procedure. The opposite construction, accepted by the court below, sets an unnecessary snare for the average lawyer, allowing an initial *faux pas* in this difficult procedural situation to deprive his client of jury trial—a procedural advantage which Congress was most desirous to

extend to seamen. *See Civil v. Waterman S.S. Corp., supra*, 2 Cir., 217 F. 2d 94, 97. A construction which creates unnecessary procedural niceties, even in those cases where it does not work to the seaman's ultimate harm, at best puts a premium on the services of experts familiar with special pleading, increasing both the cost and the delay of litigation under the statute. And potential harm is always lurking.

Appellees direct us to language in some older appellate opinions suggesting that the "election" is made at the time of the complaint. But those cases dealt with a plaintiff's choice between substantive theories and not, as here, with his choice as to the form of trial; and they did not deal with an effort made by the plaintiff after filing his libel, but before the defendant has answered, to alter his original "election." e.g., *Engel v. Davenport, supra*, 271 U. S. 33; *Skolar v. Lehigh Valley R. Co.*, 2 Cir., 60 F. 2d 893; *Hammond Lumber Co. v. Sandin, supra*, 9 Cir., 17 F. 2d 760.

Other cases cited by appellees deal with the situation where one suit has proceeded to judgment before the second action is dismissed. Those cases rest on the theory of *res judicata*, but are inapposite here, since neither present action has reached judgment, e.g., *Baltimore S.S. Co. v. Phillips*, 274 U. S. 316; *Jonassen v. Norwegian Am. Line, supra*, D. C. S. D. N. Y., 105 F. Supp. 510.

Kaldman v. W. & A. Fletcher Co., 3 Cir., 20 F. 2d 465, appears to support the appellees' contention for an early election, although the election there found was between a claim of negligence and a claim of unseaworthiness. How far that part of the opinion is law in that circuit today may be considered doubtful. Compare *McCarthy v. American Eastern Corp.*, 3 Cir., 175 F. 2d 724, certiorari denied *American Eastern Corp. v. McCarthy*, 338 U. S. 868. In any event we have quite clearly held otherwise. *O'Neill v. Cunard White Star, supra*, 2 Cir., 160 F. 2d 446; *Civil v. Waterman S.S. Corp., supra*, 2 Cir., 217 F. 2d 94.

We conclude that until ten days after issue is joined a libelant can transfer part of his suit to the civil side of the district court for jury trial, although it contains a claim

under the Jones Act. Consequently the Jones Act does not require dismissal of the plaintiff's complaint on an "election" rationale. Nor was the complaint unduly vexing to the defendants, who could have moved at any time to consolidate it with the pending libel. Had the two suits been in different courts, dismissal might have been appropriate on such grounds; but even then the trial judge might prefer to transfer one suit under 28 U. S. C. §1404 to the district where the other is pending for consolidation with it.

Our disposition of the case reopens the question of which issues are triable to the jury, which the district court had so abruptly resolved. The Jones Act claim is of course cognizable at law; but there is more difficulty with the counts alleging unseaworthiness, maintenance and cure, and recovery in some capacity other than that of a seaman. Plaintiff has indicated that she will amend her complaint to allege diversity of citizenship, so that we need not here decide whether or not in the absence of such allegations the district court could hear such claims at law on the theory that they were ancillary or pendant to the civil action under the Jones Act and part of the same cause of action. See *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, *supra*, 2 Cir., 234 F. 2d 253, 258; *Doucette* v. *Vincent*, 1 Cir., 194 F. 2d 834, 840, note 5. We point out only the obvious convenience of a consolidation of the admiralty and civil actions, so that the *in personam* claims may be tried to a jury at the same time that the *in rem* claims are tried to the court. Of course the final rationale for a judgment is for the court, so that there need never be an "election" between legal theories. See *Gins* v. *Mauser Plumbing Supply Co.*, 2 Cir., 148 F. 2d 974, 976. The court, in arriving at its ultimate judgment, will make the choice, dictated naturally only by the principles of substantive law which govern the relief sought.

Miss McAfoos' employer, William Neff, joined in the libel and complaint, seeking recovery of business losses allegedly caused by Miss McAfoos' injury. What has been said of Miss McAfoos' claim applies equally to the derivative claim of her employer.

Reversed and remanded.

Judgment of Reversal of United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of April, one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge

HON. J. EDWARD LUMBARD

HON. STERRY R. WATERMAN
Circuit Judges.

EVELYN McAFOOS & WILLIAM NEFF,
Plaintiffs-Appellants,

v.

THE CANADIAN PACIFIC STEAMSHIPS, LTD. & THE CANADIAN PACIFIC RR.
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and action remanded in accordance with the opinion of this court; with costs to the appellants.

A. DANIEL FUSARO,
Clerk.

SUPREME COURT U.S.
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FILED
1957
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

223.

THE CANADIAN PACIFIC STEAMSHIPS, LTD., and
THE CANADIAN PACIFIC RAILWAY CO.,

Petitioners,

against

EVELYN McAFOOS and WILLIAM NEFF,

Respondents.

PETITIONER'S REPLY BRIEF.

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DENNIS P. DONOVAN,
ERNEST S. BALLARD, JR.,
Of Counsel.

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against

EVELYN MCAFOOS and WILLIAM NEFF,

Respondents.

PETITIONER'S REPLY BRIEF.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents brief suggests, as does the decision of the Circuit Court below, that an "ambiguous legal status" led the attorneys for Miss McAfoos to commence this second action a month after the original suit in admiralty was commenced. Such suggestion carries the erroneous implication that some substantive claim will be denied Miss McAfoos if she proceeds in admiralty, where she first elected to proceed. However, the suit in admiralty presents every claim urged in this suit at law. The petition for certiorari here raises no problem as to any substantive rights of plaintiffs below, but rather this petition presents a problem of statutory construction: i.e., does the *election* requirement of the Jones Act prohibit the plaintiffs below from maintaining against the defendants below, two identical actions, one in admiralty and one at law.

Plaintiffs rely, in this Court, primarily on the case of *McCarthy v. American Eastern Corp.*, 3 Cir. 175 F. 2d 724

cert. denied 338 U. S. 868, to support the holding of the Circuit Court below that the Jones Act, regardless of the specific language of that Act as to election, requires no election. But the McCarthy case does not justify the maintenance of two suits simultaneously and, on the contrary, indicates that an election is required between a suit at law and a suit in admiralty (175 F. 2d 726):

> "In our view the election to which the Jones Act refers is an *election of remedies as between a suit in admiralty and civil action.* Prior to the passage of the Jones Act, unless there was diversity of citizenship, a seaman was compelled in the federal court to assert his cause of action for injuries in a suit in admiralty in which there was no jury trial. It was the purpose of the 'election' clause of the Jones Act, we think, to make certain that an injured seaman, *instead of suing in admiralty*, could at his option assert his cause of action for personal injuries in the federal court in an action at law regardless of diversity of citizenship * * *"
> (Emphasis supplied and footnote citations omitted)

The language of the Jones Act, which states that a seaman "may, at his election, maintain an action for damages at law * * *" has been made meaningless by the court below. The confusion resulting can only produce hardship to plaintiffs and defendants alike.

The petition should be granted.

Respectfully submitted,

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ERNEST S. BALLARD, JR.
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No. 223

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JOHN T. FEY, Clerk

IN THE

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OCTOBER TERM, 1956

THE CANADIAN PACIFIC STEAMSHIPS, LTD., and
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Petitioners,

AGAINST

EVELYN McAFOOS and WILLIAM NEFF
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EVELYN MCAFOOS and WILLIAM NEFF,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners' Application

Petitioners, The Canadian Pacific Steamships, Ltd., and The Canadian Pacific Railway Co., seek certiorari to review the reversal by the United States Court of Appeals for the Second Circuit of the dismissal of the complaint by the United States District Court for the Southern District of New York.

Statement

The opinion below epitomizes the factual situation. Respondent McAfoos " " " who was employed as a magician's assistant aboard the vessel 'Empress of Scotland,' allegedly suffered personal injuries when she fell through

an opening in the hold of the vessel while it lay berthed in the Port of New York. She claimed that the boards which normally furnished the deck of the hold had been removed by crew members and not replaced. Thus liability might be predicated on either unseaworthiness or the negligence of the crew members. Although Miss McAfoos enjoyed the social status of a ship's officer, she never signed the ship's articles, was reported to have been listed by the ship as a passenger, and was paid by her employer, co-plaintiff Neff, rather than by the shipowner. On trial she might be proved to be a seaman, a passenger, or a business invitee. Her ambiguous legal status and the nature of the accident posed a procedural dilemma for the plaintiff at the threshold of the suit (* * * 19-20) * * * plaintiff's attorney commenced suit by filing a libel in the federal district court against the vessel and the shipowners, alleging negligence, unseaworthiness, and a claim for maintenance and cure, and describing Miss McAfoos as alternatively a crew member or a business invitee. The Jones Act, although not mentioned by name in the libel, was pleaded, * * * (20) * * * A month later plaintiff's lawyer filed a civil complaint against the shipowners in the same district court, alleging the same facts and theories; this time the Jones Act was mentioned by name and jury trial was asked on all issues. Before the defendants filed an answer Judge Levet granted their motion, dismissing the complaint as unduly vexatious and because plaintiff by filing a libel had already irrevocably elected to sue in admiralty instead of at law. D. C. S. D. N. Y., 143 F. Supp. 73. Thus plaintiff was left to proceed solely in admiralty, that is, without jury trial" (20-21)

***References herein to the appendix in this court are by page number.

Summary of Argument

1. There is no conflict in the expressions on the subject between the Second and Third Circuits which requires resolution by this Court.

2. The determination in respect whereof certiorari is sought is interlocutory, not final, and relates to a procedural, not substantive, phase of litigation.

3. The question is not novel and, in its underlying aspect, has been the subject of consideration by this Court.

POINT I

There is no conflict in the expressions on the subject between the Second and Third Circuits which requires resolution by this Court.

The carefully reasoned and clearly articulated opinion of the Court of Appeals for the Second Circuit has crystallized the basic question and has projected it into accurate focus. What is involved is no matter of substance but a remedial, procedural question.

The petitioners affect to assert that the "election" under the Jones Act has been the subject of divergent views by the Second and Third Circuits, which requires that this court speak thereon with finality. But, it is urged, there is no such conflict. Indeed, the views of the Court of Appeals in both Circuits, in respect of the question at issue, are in complete harmony with one another.

It is true that the Third Circuit in *Kuhlman* v. *W. & A. Fletcher Co.*, 20 F. (2d) 465 (1927), as the opinion herein of the Court of Appeals for the Second Circuit points out,

"* * * appears to support the appellees' contention for an early election, although the election there found was between a claim of negligence and a claim of unseaworthiness" (24). With understandable judicial restraint, Chief Judge Clark continues, "How far that part of the opinion is law in that circuit today may be considered doubtful. Compare *McCarthy* v. *American Eastern Corp.*, 3 Cir., 175 F. 2d 724; certiorari denied *American Eastern Corp.* v. *McCarthy*, 338 U. S. 868" (24).

The *McCarthy* case, decided twenty two years after the *Kahlman* case, is wholly antithetical to the determination in the *Kahlman* case. The decision in *McCarthy* represents a complete departure from the holding in the *Kahlman* case and, to the extent that the two decisions may be said to be in conflict, the *Kahlman* case must be deemed overruled and superseded by the later *McCarthy* decision.

Pinpointing the problem, Judge Maris in the *McCarthy* case, said at page 724 of that opinion:

> "* * * the claim derived both from the admiralty law of unseaworthiness and the Jones Act. * * *"

At page 725 the opinion continues:

> "The contention is that under the Jones Act the plaintiff was required to elect between these two bases for recovery and, therefore, could not rely upon both of them at the same time. In German v. Carnegie Illinois Steel Corp., 3 Cir., 1946, 156 F. (2d) 977, this court expressly rejected this contention, holding that it was error for the district court to require a seaman to make such an election."

In discussing the determination of this court in the case of *Baltimore S.S. Co.* v. *Phillips*, 274 U. S. 316, to which case the petition adverts, as reflecting reliance thereon by

Judge Maris in the *McCarthy* case, the learned Judge quotes from page 324 of the opinion by this court in the *Baltimore* case:

> "'It follows that here both the libel and the subsequent action were prosecuted under the maritime law and every ground of recovery, open to respondent in the second case, was equally open to him first.'"

The opinion in the *McCarthy* case goes on to say at page 726:

> "This is a ruling by the Supreme Court that the ground of negligence of the crew under the Jones Act could have been asserted in the prior suit along with the grounds of unseaworthiness and negligence of the owner which had been asserted in that suit. The case is thus direct authority for the action here taken by the district court."

With penetrating insight, Judge Maris further discusses the ensuing result were one, entitled to sue both under the maritime law and the Jones Act, required, at his peril, to determine which of the actions he must "elect" to pursue and the effect of *res judicata* were he to guess wrong with a resulting adverse determination. Said the court at page 726 of the *McCarthy* opinion:

> "He would thus be denied the right to any day in court upon what may turn out to have been his only valid ground for relief. And in some cases the choice might well be the nice one, often baffling to the most experienced lawyer. * * * We cannot believe that Congress, when it passed the Jones Act as a measure for the relief of injured seamen intended that it should put them at their peril to any such choice as this."

Indicative of the complete abandonment of what may have been signified by the holding in the *Kuhlman* case, and of recognition of the fact that such case, which had preceded the McCarthy holding by twenty-two years, was not expressive of existing law, is a district court opinion in the same circuit, in 1951, in *Stalker* v. *Southeastern Oil Delaware*, 103 Fed. Supp. 436, wherein the court, with understandable understatement, said at page 439 of the opinion:

> "It seems clear that the concepts of the rights of an injured seaman have undergone a change since the Kuhlman case."

The district court, in its opinion, recognized the import of the holding by this court in the *Baltimore* case and, in keeping with the rationale of the *McCarthy* case, adopted the concept therein given cogent expression.

There is, therefore, no conflict between the Second and Third Circuits which requires resolution by this court. It is noteworthy that this court denied certiorari in the *McCarthy* case (338 U. S. 868).

POINT II

The determination in respect whereof certiorari is sought is interlocutory, not final, and relates to a procedural, not substantive, phase of litigation.

The judgment below is not final. The petitioners' motion to dismiss was made before answer; issue had not been joined. Petitioners so acknowledge. There is no basis for the petition, in the circumstances which here obtain, in respect of a remedial, procedural question.

A number of the cases cited by the petitioners deal with aspects of *res judicata* and estoppel by judgment, after trial. It is submitted that there is no case holding that the mere filing of a suit constitutes an "election" under the Jones Act. No case where there has not been a prior determination on the merits has permitted dismissal of a subsequent action.

Reduced to its essentials, the procedural problem is posed in the opinion of the court below (21):

> "Actually the complaint, filed with the court and served on the defendants, gave all concerned adequate notice that plaintiff was seeking jury trial on all possible issues; and it should make no difference under either the Admiralty Rules or the Federal Rules of Civil Procedure whether at that initial stage of pleading plaintiff demanded jury trial by motion to transfer or by what was technically a second action."

The court further said (23):

> "The 'election' contemplated by the Jones Act is primarily a decision as to the form of trial—whether jury or non-jury. Balado v. Lykes Bros. S.S. Co., supra, 2 Cir., 179 F. 2d 943, 945."

and reached the conclusion that (23)

> "We think that Congress, by its silence as to the time when 'election' must be made, intended that the time for seeking jury trial was to be governed by the ordinary rules of procedure. The opposite construction, accepted by the court below, sets an unnecessary snare for the average lawyer, allowing an initial faux pas in this difficult procedural situation to deprive his client of jury trial. * * *"

POINT III

The question is not novel and, in its underlying aspect, has been the subject of consideration by this Court.

The underlying principle was dealt with by this court in *Baltimore S.S. Co.* v. *Phillips*, 274 U. S. 316 (1926). In any event, the rationale of the holding below, given cogent expression in the opinion of Chief Judge Clark, appeals to reason and the inherent justice of the cause. When Judge Maris in the *McCarthy* case, *supra*, construed the holding in the *Baltimore* case as "* * * direct authority for the action here taken by the district court", this court denied certiorari in 338 U. S. 868.

Conclusion

As the petitioners acknowledge, there is here involved not a final judgment but, rather, an interlocutory phase of litigation.

There is neither "substantial conflict" nor "confusion", as the petitioners contend there is, in the lower courts. The question posed by petitioners is not novel; it has been passed upon; there is no conflict between the Second and Third Circuits in respect of what the petitioners pose; indeed, certiorari in respect thereof has heretofore been denied by this court.

There is, therefore, no justifiable warrant for the application herein.

Respectfully submitted,

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Attorneys for Respondents.

BENJAMIN ADLER,
Of Counsel.